different prosecution for each distinct offense. *Rocco* v. *State* (1859) 37 Miss. 357; *Emerson* v. *State*, supra; *Kansas* v. *Shafer*, supra; *C. & O. R. R. Co.* v. *Com.* supra. It is believed that the principal case stands alone in this respect and that in endeavoring to establish identity of fact by an application of the "evidence" test to a situation involving several and distinct transactions, it is not to be supported either upon principle or authority.

---

ATTACHMENT OF REALTY IN CONFLICTS OF JURISDICTION.—The concurrent jurisdiction of federal and state courts over property within the same territorial limits leads inevitably to occasional conflict between them. In such cases it becomes important to note the principles of comity which govern the courts in avoiding unseemly antagonism. It is generally laid down that property in the custody of a court must not be interfered with by any other, except one of direct supervisory control or superior jurisdiction. *Freeman* v. *How* (1860) 24 How. 450. It is even said in *Covell* v. *Heyman* (1883) 111 U. S. 176, 182, that "when one court takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried into a different territorial sovereignty." Although this statement, unless it employs the word "jurisdiction" as equivalent to possession, is too broad, it is certain that in such a situation any act is unwarranted which amounts to an interference in or is inconsistent with the court's control. *In re Tyler* (1892) 149 U. S. 164; *Shields* v. *Coleman* (1894) 157 U. S. 168. In this connection the question of process is especially prominent, being necessarily involved in any question as to the extent of control which the court has assumed. The necessity of determining the exact nature and the precise effect of a particular process is illustrated by a recent case in which a federal court held that the seizure and sale of real estate by receivers appointed in a state court was not an unwarranted interference with the federal court's prior levy of attachment on the same property. *Ingraham* v. *National Salt Co.* (1905) 139 Fed. 684.

Despite its statutory nature, the subject of attachment as a mesne process may be treated generally, owing to the practical uniformity of principle underlying the various laws. It is everywhere held that the levy of attachment upon personal property not only creates a lien in favor of the plaintiff in the action to which it is ancillary, but also puts the property in the constructive possession of the court, *Hagan* v. *Lucas* (1836) 10 Pet. 400; *Taylor* v. *Carryl* (1857) 20 How. 583, as shown by the general requirement that the property be taken into the custody of the sheriff, Drake on Attachment, 5th ed., § 256 and note, who alone can make subsequent levies, *Watson* v. *Todd* (1809) 5 Mass. 271, and whose continued possession, either immediate, or by bailee, *Robinson* v. *Mansfield* (1832) 13 Pick. 139, is essential to the existence of the attachment lien. *Gower* v. *Stevens* (1841) 19 Me. 92. Moreover, the court's officer gains special property in the goods, by virtue of which he may maintain replevin against a wrongful taker. *Rhoads* v. *Woods* (1864) 41 Barb. 471.

On the other hand, one who levies on real estate acquires neither property, *Scott* v. *Print Works* (1863) 44 N. H. 507, nor right to

possession. *Wood* v. *Weire* (Ky. 1845) 5 B. Mon. 544. It has been held that he need not go upon the property nor see it. *Perrin* v. *Leverett* (1816) 13 Mass. 128; *Rodgers* v. *Bonner* (1871) 45 N. Y. 379. And, unlike personal property, attached realty cannot be relieved of the lien by any act of the officer, *Braley* v. *French* (1856) 28 Vt. 546, 552, and is said to be subject to junior levies by other officers. *Kittredge* v. *Warren* (1844) 14 N. H. 509, 522. It would seem therefore that in the case of real estate the levy of attachment does not give the court from which the process issues possession or custody. *Heidritter* v. *Oil Cloth Co.* (1884) 112 U. S. 294; In re *Hall* (1896) 73 Fed. 527. But see *So. Bk. & Trust Co.* v. *Folsom* (1896) 75 Fed. 929.

Expressions may be found to the effect that the principles of comity which arise in this connection are based upon the fact of the court's jurisdiction. *Covell* v. *Heyman*, supra. But in view of the purpose of such principles and the rules of procedure that have been adopted under them, the position that the root idea is not jurisdiction but possession appears to be the better. *Buck* v. *Colbath* (1865) 3 Wall. 334; *Wiswall* v. *Sampson* (1852) 14 How. U. S. 52. A practical result of this position is to vest in the court first obtaining possession, not only the right to dispose of the property subject to pre-existing liens upon it, but the right to adjudicate the validity of the liens themselves. The general right of a court to regulate and pass upon its own process as a necessary part of its jurisdiction is well recognized. *Freeman* v. *Howe*, supra. Yet it does not seem possible to escape the conclusion that the court first acting must give way in this respect where its act does not involve possession of the property in question. In re *Hall*, supra. While the importance of this as between state and federal courts is minimized by the fact that the latter in issuing process are governed by the state laws, U. S. Rev. Stat. (1872) § 915, and follow the state courts where possible in interpretation and practice, *Rice* v. *Commission Co.* (1895) 71 Fed. 151, it is interesting as an apparent exception to the general rights of priority recognized in conflicts of jurisdiction.

---

STATE CONTROL OF NON-NAVIGABLE WATERS.—The question of the control of a state over non-navigable waters flowing entirely within its boundaries has lately been presented in New Jersey. *McCarter, Atty. Gen.* v. *Hudson County Water Co.* (1905) 61 Atl. 710. The defendant company chartered in New Jersey, was pumping water out of the Passaic river and transporting it by pipes into New York, contrary to a statute of New Jersey. The defendant contended that the statute was void as being in violation of the constitutional guarantees of property and a regulation of interstate commerce. The court placed its decision upon the novel ground that the state, owning the bed of a navigable portion of the river further down, was entitled to riparian rights and consequently could insist upon having the waters of the river come down undiminished except by the lawful use of the upper riparian proprietors. The case really involves the larger principle of the right of a state by legislation to prevent the taking of water from a stream and the transportation of it into another state, the